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**STATE OF WISCONSIN
SUPREME COURT**

02-28-2011

**CLERK OF SUPREME COURT
OF WISCONSIN**

MARK KLEMM and JEANNE KLEMM,

Plaintiffs-Respondents-Petitioners,

v.

**AMERICAN TRANSMISSION COMPANY,
LLC,**

Defendant-Appellant.

**Appeal No.
2009AP002784**

**Circuit Court Case No.
2008CV000432**

PLAINTIFFS-RESPONDENTS-PETITIONERS' BRIEF

**Appeal From The Circuit Court Of Marathon County,
The Honorable Gregory Huber, Presiding**

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ISSUE PRESENTED

Does Wis. Stat. §32.28(3)(d) require litigation expenses to be awarded to a property owner who conveys property in lieu of condemnation pursuant to Wis. Stat. §32.06(2a), with no jurisdictional offer issued under Wis. Stat. §32.06(3), followed by a condemnation commission just compensation award which was not appealed and otherwise meets all other requirements of the statute?

Answer by the circuit court: Yes

Answer by the court of appeals: No

STANDARD OF REVIEW

The issue presented requires an interpretation of statutory language applied to undisputed facts. The interpretation of statutes is reviewed independently of lower court decisions, but this Court may benefit from the analysis of the lower courts. *Spiegelberg v. State of Wisconsin and Department of Transportation*, 2006 WI 75, ¶8, 291 Wis.2d 601, 717 N.W.2d 641; *See also Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶18, 319 Wis.2d 274, 767 N.W.2d 898, *Warehouse II, LLC v. DOT*, 2006 WI 62, ¶4, 291 Wis.2d 80, 715 N.W.2d 213.

STATEMENT OF THE CASE

This matter involves the taking of an easement pursuant to Wis. Stat. §32.06 by the Defendant-Appellant, American Transmission Company, LLC (“ATC”) for the purpose of constructing an electric transmission line across the property of the Plaintiffs-Respondents-Petitioners, Mark Klemm and Jeanne Klemm (“Klemms”). The question presented is whether the Court of Appeals, District III erred in construing Wis. Stat. §32.28(3)(d) as requiring the condemnor to make a jurisdictional offer as a precondition for awarding litigation expenses to condemnee.

ATC initiated the condemnation process and submitted an appraisal of the Klemm property by Steigerwaldt Land Services Co. R. 14, p. 1, P-APP-27. According to the Steigerwaldt appraisal, just compensation owed by ATC was \$7,750.00. R. 14, p. 1, P-APP-27. With the understanding that ATC wanted to start construction on the line as soon as practical, the Klemms accepted ATC’s written offer for the Electric Transmission Line Easement (“Easement”) over the Klemm property. R. 14, Ex. 1, P-APP-27. The Easement contained a \$7,750.00 certificate of compensation for the taking. R. 14, Ex. 1, P-APP-34.

The Klemms understood that they could execute the Easement and still contest the amount of the compensation needed to make them whole. R. 14, p. 2, P-APP-28. The Klemms’ understanding was based on language in the certificate of compensation that stated in bold type “**Notice of Right to Appeal**”, and included the requirements

for an appeal, and the six month time period in which to commence an appeal. R. 14, Ex 1, P-APP-34.

The Klemms filed a timely Notice of Appeal and Petition pursuant to Wis. Stat. §32.06(2a). R. 1, P-APP-5-13. After a hearing, the county condemnation commission awarded the Klemms the sum of \$10,000.00. R. 14, Ex., P-APP-14-15. This sum exceeded ATC's highest written offer by \$2,250.00 and was more than 15% of the offer.

Subsequently ATC and the Klemms negotiated a settlement. R. 14, Ex. 3, P-APP-37-38. The settlement provided that neither party would appeal the condemnation commission's award. R. 14, Ex. 3, P-APP-37-38. In exchange, the Klemms were to receive \$30,000.00 and the parties would litigate whether the Klemms were entitled to litigation expenses, pursuant to Wis. Stat. §32.28(3)(d). R. 14, Ex. 3, P-APP-37-38.

On Klemms' motion for litigation expenses, the circuit court determined that the Klemms were entitled to litigation expenses under Wis. Stat. §32.28. R. 18, P-APP-83-89. Subsequently the parties stipulated to an order for final judgment which included a sum representing reasonable attorney fees. R. 19, R. 20, R. 21, P-APP-113-115.

ATC subsequently appealed the circuit court's decision awarding litigation expenses. The Court of Appeals, District III, in a published opinion, reversed the circuit court's decision, holding that litigation expenses are not available under Wis.

Stat. §32.28(3)(d) unless the condemnor has made a jurisdictional offer. Thus, since ATC did not make a jurisdictional offer, the Klemms were not entitled to litigation expenses. *Klemm v. American Transmission Co., LLC*, 2010 WI App 131, 791 N.W.2d 233. P-APP-1-4.

The Klemms' petition for review to this Court was granted pursuant to Wis. Stat. §808.10.

STATUTE INVOLVED

32.28 Costs. (1) In this section, "litigation expenses" means the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under this chapter.

(2) Except as provided in sub. (3), costs shall be allowed under ch. 814 in any action brought under this chapter. If the amount of just compensation found by the court or commissioners of condemnation exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer, the condemnee shall be deemed the successful party under s. 814.02 (2).

(3) In lieu of costs under ch. 814, litigation expenses shall be awarded to the condemnee if:

- (a) The proceeding is abandoned by the condemnor;
- (b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking;
- (c) The judgment is for the plaintiff in an action under s. 32.10;
- (d) The award of the condemnation commission under s. 32.05 (9) or 32.06 (8) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15% and neither party appeals the award to the circuit court;
- (e) The jury verdict as approved by the court under s. 32.05 (11) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%;
- (f) The condemnee appeals an award of the condemnation commission which exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the award of the condemnation commission by at least \$700 and at least 15%;

(g) The condemnor appeals the award of the condemnation commission, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%;

(h) The condemnee appeals an award of the condemnation commission which does not exceed the jurisdictional offer or the highest written offer prior to the jurisdictional offer by 15%, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%; or

(i) The condemnee appeals an assessment of damages and benefits under s. 32.61 (3), if the judgment is at least \$700 and at least 15% greater than the award made by the city.

ARGUMENT

A CONDEEMNEE IS ENTITLED TO AN AWARD OF LITIGATION EXPENSES UNDER WIS. STAT. §32.28 WHEN THE CONDEEMNEE ACCEPTS AN OFFER DURING NEGOTIATIONS PRIOR TO THE JURISDICTIONAL OFFER

To Ascertain The Meaning Of The Plain Language Of Wis. Stat. §32.28(3)(d) The Court Must Consider Chapter 32 As A Whole

The Court of Appeals held that litigation expenses are not available under Wis. Stat. §32.28(3)(d) unless the condemnor has made a jurisdictional offer. This conclusion is based upon the “plain language” of Wis. Stat. §32.28(3)(d). According to the Court of Appeals, “The use of the article ‘the’ anticipates that there is, in fact, a jurisdictional offer” as a condition precedent to the recovery of litigation expenses. *Klemm*, 2010 WI App 131, ¶10, P-APP-3.

In contrast, a line of cases from this Court emphasizes that, “Plain meaning may be ascertained not only from the words employed in the statute, but also from the context in which the words are used.” *Brunton v. Nuvelt Credit Corp.*, 2010 WI 50,

¶16, 325 Wis.2d 135, 785 N.W.2d 302. [Other citations omitted]. This Court in *Brunton* further explained,

In construing a statute, we favor a construction that fulfills the purpose of the statute over one that undermines that purpose. *City Of Dane v. LIRC*, 2009 WI 9, ¶34, 315 Wis.2d 293, 759 N.W.2d 571. ‘[A] plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose.’ *Kalal*, 271 Wis.2d 633, ¶49, 681 N.W.2d 110. While extrinsic sources are usually not consulted if the statutory meaning is plain, legislative history may be consulted ‘to confirm or verify a plain-meaning interpretation.’ *Id.*, ¶51 2010 WI 50, ¶ 17.

In *State, ex rel. v. Rupinski*, 2007 WI App 4, ¶14, 297 Wis.2d 749, 728 N.W.2d

1, the Court of Appeals stated this principle in a somewhat different fashion,

Statutory interpretation begins with the language of the statute itself. *Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶10, 232, Wis.2d 587, 605 N.W.2d 515. Courts, however, must not examine a portion of a statute in isolation ignoring the overall intent of the statutory scheme. *Id.* Courts have ‘some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning...would thwart the obvious purpose of the statute.’ *Id.* (citations omitted). ‘When a literal interpretation produces absurd or unreasonable results, or results that are clearly at odds with the legislature’s intent, “our task is to give some alternative meaning” to the words,’ *Id.* (citation omitted), consistent with the reasonably ascertained intent.

In the context of analyzing the words “reasonable and necessary attorney fees”

in Wis. Stat. §32.28 the Court stated in *Standard Theatres, Inc. v. State of Wisconsin Department of Transportation, Division of Highways*, 118 Wis.2d 730, 740, 349 N.W.2d 661 (1984), as follows:

When this court looks to the language of section 32.28, Stat., the statute must be interpreted on the basis of the plain meaning of its terms. *State v. Derenne*, 102 Wis.2d 38, 45, 306 N.W.2d 12 (1981). If the meaning of the language utilized is clear and unambiguous on its face, then it is improper to turn to extrinsic aids to determine the meaning intended. *Id.* See also, *State v. Tollefson*, 85 Wis.2d 162, 167, 270 N.W.2d 201 (1978). Also, the intent of a section of a statute must be derived from the act as a whole. *Id.*

More recently, in an examination of Wis. Stat. §32.09(6), this Court explained,

When we interpret a statute, we rely on the criteria set out in *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110. In *Kalal*, we explained that “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect. *Id.* at ¶44.

Context is also important when determining the plain meaning of a statute, as is the purpose of the statute and its scope, if those qualities can be ascertained from the language of the statute itself. *Id.*, ¶¶ 46-48. These are all intrinsic sources for statutory interpretation. *Id.* However, if statutory language is ambiguous, we often consult extrinsic sources such as legislative history. *Id.* at ¶48. *Spiegelberg v. State of Wisconsin and Department of Transportation*, 2006 WI 75, ¶17, 291 Wis.2d 601, 717 N.W.2d 641.

Accordingly, to discern the plain meaning of Wis. Stat. §32.28(3)(d) the Court may consider its purpose, statutory plan, and context. Legislative history should be consulted to verify the plain meaning of the language.

The Lower Courts’ Contradictory Constructions Of Wis. Stat. §32.28 Establish Ambiguity

The Klemms acknowledge, and the Court of Appeals noted, “Nor do they [Klemms] contend the language is ambiguous.” 2010 WI App 131 ¶12. However, the circuit court concluded with respect to Wis. Stat. §32.28(3)(d):

The plain language of the statute [Wis. Stat. §32.28(3)(d)] makes litigation expenses available under both of the litigation scenarios discussed above--both petitions under sub. (7) [Wis. Stat. §32.06(7)] and appeals under (2a) [Wis. Stat. §32.06(2a)].

R. 18, p. 3, P-APP-85.

According to the Court of Appeals, “Instead, our focus is on the plain language of the statute.” *Klemm*, 2010 WI App 131 ¶10. The Court of Appeals later determined, “First, because we do not deem the statute’s language ambiguous, it

would be improper to alter its plain meaning through liberal construction.” *Id.* at ¶ 12. While reaching the dramatically opposite conclusion of the circuit court, the Court of Appeals stated, “We cannot ignore the statute’s plain language.” *Id.* at ¶ 13.

It is apparent based upon the differing interpretations placed upon Wis. Stat. §32.28(3)(d) by the learned circuit court and Court of Appeals that there is ambiguity in the statute because reasonable persons disagree as to its meaning. This Court acknowledged this principle in *Standard Theatres, Inc.*, 118 Wis.2d at 740, citing *Aero Auto Parts, Inc. v. Dept. Of Transportation.*, 78 Wis.2d 235, 238-39, 253 N.W.2d 896 (1977) as follows:

As this court has acknowledged, the threshold question to be addressed by this court when construing a statute is whether the statutory term is ambiguous. *State v. Engler*, 80 Wis.2d 402, 406, 259 N.W.2d 97 (1977). A statutory term is ambiguous if reasonable persons could disagree as to its meaning. *Kollasch v. Adamany*, 104 Wis.2d 552, 561, 313 N.W.2d 47 (1981). However, this court has also recognized that whenever a case such as this reaches the court, parties obviously disagree as to a statute’s meaning. Therefore, the court must look to the language of the statute itself to determine whether well-informed persons should have become confused.

Accordingly, this Court needs to examine the entire Chapter including Wis. Stat. §32.06 along with the provisions of Wis. Stat. §32.28.

**The Statutory Context Of Chapter 32
Supports The Conclusion That A Jurisdictional
Offer Is Not Required For Litigation Expenses To Be Awarded**

Statutes are to be construed *in pari materia*, together with related statutes on the same subject. *Pulsfus Poultry Farms, Inc. v. Town of Leeds*, 149 Wis.2d 797, 804, 440 N.W.2d 329 (1989).

This Court in *Standard Theatres* discussed the policy underlying Chapter 32,

When we consider the policy behind ch. 32, which is to justly compensate the condemnee for any lands taken by the condemnor by the condemnor's exercise of the power of eminent domain, the position taken by the state is unreasonable. When the owner is deprived of property against his or her will, it is obvious that the owner is not justly compensated for his or her property if the owner must initially be forced to litigate in order to obtain full value of the land, and then must pay for his or her attorney fees from this full value. The attorneys fees incurred here were, after all, necessitated by the owner's attempt to get the fair value of the owner's real estate. Therefore, one must start from the premise that the owner is to be compensated for the attorneys fees. In other words, the purpose behind the statute is to make the owner 'whole' through compensating the owner for the value of the property taken and for the attorney fees it occurred in attempting to obtain this value. 118 Wis.2d. 730, 744-45.

This matter began, as all condemnations begin, with the condemnor obtaining an appraisal of the property to be taken. Wis. Stat. §32.06(2). The property owner then had the option to obtain another appraisal. Wis. Stat. §32.06(2) states:

If the owner does not accept a negotiated offer under sub. (2a) or the jurisdictional offer under sub. (3), the owner may use an appraisal prepared under this paragraph in any subsequent appeal.

Once the appraisals have been obtained, the negotiations begin.

Before making the jurisdictional offer under sub. (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners ... of the property sought to be taken for the purchase of the same. Wis. Stat. §32.06(2a).

If the property owner executes a conveyance at this point, it is filed with the register of deeds along with a certificate of compensation. Wis. Stat. §32.06(2a).

The property owner is then authorized to commence litigation concerning just compensation as the Klemms did in this case. Wis. Stat. §32.06(2a) states in relevant part:

... Any person named in the certificate may, within 6 months after the date of its recording, appeal from the amount of compensation therein stated by filing a

petition with the judge of the circuit court of the county in which the property is located for proceedings to determine the amount of just compensation.... The judge shall forthwith assign the matter to the chairman of the county condemnation commissioners *for hearing under sub. (8)*. The procedures prescribed under subs. (9) (a) and (b), (10) and (12), and chs. 808 and 809 shall govern such appeals. The date the conveyance is recorded shall be treated as the date of taking and the date of evaluation. Italics added.

The circuit court reviewed the two alternate routes to reach the condemnation commission. As the circuit court explained,

[I]f negotiations do not result in an agreement, then the next step is for the condemnor to make a jurisdictional offer. Wis. Stat. §32.06(3). If the offer is accepted, then the amount offered will be paid and title will be conveyed; in that instance, no further litigation is contemplated. Wis. Stat. §32.06(6). But if the offer is not accepted, then the condemnor may petition the court to determine the amount of such compensation, and the judge will ‘assign the matter to the chairperson of the county condemnation commissioners for a hearing under s. 32.08.’ Wis. Stat. §32.06(7).

Regardless of which method is used to commence the just compensation litigation -- an appeal under sub. (2a) or a petition under sub. (7) --the result is a condemnation commission hearing under §32.08. In other words, the statutory condemnation procedure offers two different routes to the same destination...

R. 18, pp. 2-3. P-APP-84-85.

The circuit court emphasized in its decision that Wis. Stat. §32.06(8) begins with “[t]hereafter the commission shall proceed,” regardless of how the litigation came to the commission. The circuit court then concluded: “Thus, a commission hearing based on an unaccepted jurisdictional offer is as much a hearing under §32.06(8) as is a hearing based on an appeal from an agreed price.” R. 18, p. 3. P-APP-85.

After the condemnation commission renders its decision, the issue of litigation expenses arises. Wis. Stat. §32.28(3)(d) provides that litigation expenses are awarded when:

The **award of the condemnation commission under ...s. 32.06(8)** exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15% and neither party appeals the award to the circuit court. (Bold added).

In sum, reading in context Wis. Stat. §32.28(3)(d), under either Wis. Stat. §32.06(2a) or Wis. Stat. §32.06(7), a property owner who is successful before the condemnation commission pursuant to Wis. Stat. §32.06(8), is entitled to litigation expenses.

**Construing Wis. Stat. §32.28(3)(d) To Require A
Jurisdictional Offer As The Only Way A Condemnee
Is Entitled To Litigation Expenses Makes Other
Language Of The Statute Surplusage**

Statutes are to be construed, if possible, to avoid making any statutory language superfluous. *Associated Hospital Service v. Milwaukee*, 13 Wis.2d 447, 463, 109 N.W.2d 271 (1961). The Court of Appeal's construction that a jurisdictional offer is a prerequisite for an award of litigation costs makes the language "**or highest written offer prior to the jurisdictional offer**" surplusage. This language appears repeatedly in subsections (3)(d), (3)(e), (3)(f) and (3)(g). Wis. Stat. §32.28 states in relevant part:

- (3)** In lieu of costs under ch. 814, litigation expenses shall be awarded to the condemnee if:
 - (a) The proceeding is abandoned by the condemnor;

- (b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking;
- (c) The judgment is for the plaintiff in an action under s.32.10;
- (d) The award of the condemnation commission under s. 32.05(9) or 32.06(8) exceeds the jurisdictional offer **or the highest written offer prior to the jurisdictional offer** by at least \$700 and at least 15% and neither party appeals the award to the circuit court;
- (e) The jury verdict as approved by the court under s. 32.05 (11) exceeds the jurisdictional offer **or the highest written offer prior to the jurisdictional offer** by at least \$700 and at least 15%;
- (f) The condemnee appeals an award of the condemnation commission which exceeds the jurisdictional offer **or the highest written offer prior to the jurisdictional offer** by at least \$700 and at least 15%, if the jury verdict as approved by the court under s.32.05(10) or 32.06(10) exceeds the award of the condemnation commission by at least \$700 and at least 15%;
- (g) The condemnor appeals the award of the condemnation commission, if the jury verdict as approved by the court under s.32.05(10) or 32.06(10) exceeds the jurisdictional offer **or the highest written offer prior to the jurisdictional offer** by at least \$700 and at least 15%;
- (h) The condemnee appeals an award of the condemnation commission which does not exceed the jurisdictional offer or the highest written offer prior to the jurisdictional offer by 15%, if the jury verdict as approved by the court under s.32.05(10) or 32.06(10) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%; or . . .

In these four subsections of Wis. Stat. §32.28, the quoted language is “exceeds the jurisdictional offer **or the highest written offer prior to the jurisdictional offer.**” The alternative to “jurisdictional offer” is “**the highest written offer prior to the jurisdictional offer.**” This alternative covers two situations. First where the property owner accepts the “highest offer”, thereby obviating any need for the condemnor to continue the eminent domain process and to make a jurisdictional offer. In situations where the “highest offer” is accepted, it then controls the entitlement to “litigation expense” as defined in the statute. Second, this language also covers the

situation where there is an offer which is rejected followed by jurisdictional offer which is lower.

If there is no higher offer made prior to the jurisdictional offer, then the jurisdictional offer controls the entitlement to “litigation expenses.” The circuit court explained the rationale underlying the “highest offer” alternative in the context of the eminent domain process as follows:

The reference to the jurisdictional offer contained in the phrase, “the highest written offer prior to the jurisdictional offer” does not require that a jurisdictional offer actually be made -- it merely specifies a particular point in the condemnation procedure: the negotiation stage of §32.06(2a). In fact, the “prior to” language of §32.28(3)(d) echoes the beginning of §32.06(2a), which requires that negotiation be attempted “[b]efore making the jurisdictional offer.”

R. 18, pp 3-4, P-APP-85-86.

If the legislature had intended to make “the” jurisdictional offer the exclusive mechanism for triggering entitlement to “litigation expenses” then the language “**or highest offer prior to the jurisdictional offer**” would have been omitted from subsections (3)(d), (3)(e), (3)(f) and (3)(g). However, since the “highest offer” language appears four times in the statute, this Court should apply the principle explained in *Associated Hospital Service v. Milwaukee*,

...In interpreting statutes they must be construed, if possible, so as to avoid inconsistency and conflict and to give effect to every part. *State v. Berres*, (1955), 270 Wis. 103, 107, 70 N.W. 2d 197. Furthermore, it should not be presumed that any part of a statute is superfluous... 13 Wis.2d at 463.

The structure and context of the various subsections of Wis. Stat. §32.28 and §32.28(2) reinforce the conclusion that the legislature intended to allow “litigation

expenses” when the eminent domain process concludes without a jurisdictional offer having been made. Wis. Stat. §32.28(2) states the general rule allowing costs under Chapter 814 with various exceptions enumerated in Wis. Stat. §32.28(3).

The statutory purpose of Wis. Stat. §32.28(2) and Wis. Stat. §32.28(3) was explained by this Court in *Warehouse II, LLC v. Department of Revenue*, 2006 WI 62, ¶22, 291 Wis.2d 80, 715 N.W.2d 213:

Wis. Stat. §32.28(2) permits only the usual ch. 814 costs. However, ¶¶ (3)(a)-(i) of §32.28 list circumstances where the general rule of awarding only ch. 814 costs to the prevailing party is not applied and the litigation expenses set out in §32.28(1) are awarded. The occasions where the property owner is awarded more expenses incurred in contesting an action taken by a condemnor are all directed at actions that significantly short-change the property owner in some respect....These paragraphs of Wis. Stat. §32.28 level the playing field by shifting the obligation to pay expenses that may have been unnecessary if the condemnor had shouldered its responsibilities properly.

Wis. Stat. §32.28(3)(a) involves situations where the condemnation is abandoned by the condemnor. The next tier, Wis. Stat. §32.28(3)(b) addresses the situation where the condemnor may not have the right to condemn. Wisconsin Statutes §32.28(3)(c) addresses a situation of a property owner who is successful in an inverse condemnation matter. Assuming the condemnor does not abandon the proceedings and has the right to condemn, the next step is to appear before the condemnation commission, which Wis. Stat. §32.28(3)(d) addresses. Wis. Stat. §32.28(3)(e) addresses the alternative to Wis. Stat. §32.28(3)(d) -- when the property owner chooses to circumvent the commission and go directly to the jury. Wis. Stat.

§32.28(3)(f) brings back the situation where the commission is utilized and there is an appeal to a jury from its award.

The purpose underlying Wis. Stat. §32.28(3)(d) is to eliminate the requirement to pay litigation expenses whenever the condemnor's "highest offer," including but not limited to the jurisdictional offer, exceeds the condemnation commission award. It is only when the property owner is forced to appeal and thus continue the condemnation process that "litigation expenses" come into play under Wis. Stat. §32.28. The object is to make the property owner whole by providing just compensation. The legislature encouraged condemning authorities to make fair offers to property owners, consistent with fair market value, and thereby avoid having to pay litigation expenses to the property owners.

**Liberal Construction Of Wis. Stat. §32.28(3)(d) Is
To Be Afforded The Property Owner**

Another canon of statutory construction requires remedial statutes to be liberally construed. *City of Milwaukee v. Kilgore*, 193 Wis.2d 168, 187, 532 N.W.2d 690 (1995). Remedial statutes are to be liberally construed to accomplish their purposes. *City of Madison v. Hyland, Hall & Co.*, 73 Wis.2d 364, 373, 243 N.W.2d 422 (1976) ("under accepted law in Wisconsin ... remedial statutes should be liberally construed 'to suppress the mischief and advance the remedy which [the statute] intended to afford'"). See also *Szleszinski v. LIRC*, 2005 WI App 229, 287 Wis.2d 775, 706 N.W.2d 345 ¶29. Wis. Stat. §32.28(3)(d) is a remedial statute which is

intended to make the property owner whole. See generally *Rand v. Rand*, 2010 WI App 98, ¶8, 327 Wis.2d 778, 787 N.W.2d 445.

The United States Supreme Court has also consistently held that property owners are to be “...put in as good a position pecuniarily as if his property had not been taken.” *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *See also Phelps v. United States*, 274 U.S. 341, 47 S.Ct. 611, 71 L.Ed. 1083 (1927); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893).

In *Standard Theatres*, this Court discussed the liberal interpretation in favor of property owners:

Initially, we note that this court has recognized that the rule of strict construction should be applied to the condemnor’s power and to the exercise of this power. [internal citations omitted]. This is because the exercise of the power of eminent domain has been characterized as an ‘extraordinary power,’ and the rule of strict construction is intended to benefit the owner whose property is taken against his or her will. Nichols, *Eminent Domain* section 3.213[3] and [4] (rev. 3d ed. 1981). Conversely, statutory provisions in favor of the owner, such as those which regulate the compensation to be paid him or her, are to be afforded liberal construction. [internal citations omitted].” *Id.* at 742. Italics in original.

In analyzing the legislative intent, the *Standard Theatres* court noted that,

The formula [in Wis. Stat. §32.28(3)(d)] indicates that the legislature meant to discourage the condemnor from making inequitably low jurisdictional offers. The lowest allowable limit set by the legislature upon these offers is \$700 and 15% below the final award. Should the condemnor exceed this limit and offer an amount which ultimately turns out to be at least \$700 and 15% below the final award, the condemnor is forced to indemnify the condemnee for the attorneys fees incurred by an appeal. This is the obvious intent behind the formula set up by the legislature.... *Therefore, we find that the language clearly and unambiguously indicates an intention to award fees based on the condemnor’s action in making an offer....*” *Id.* at 741. (Emphasis added.)

This Court also expounded on the philosophy of liberal construction in favor of property owners in *Redevelopment Authority of the City of Green Bay v. Bee Frank, Inc.*, 120 Wis.2d 402, 409-10, 355 N.W.2d 240 (1984):

....that statutory provisions which favor an owner regarding the compensation to be paid to him or her are to be liberally construed. *Aero Auto Parts, Inc. v. Dept. of Transp.*, 78 Wis.2d 235, 241, 253 N.W.2d 896 (1977) (citing 1 Nichols, *Eminent Domain*, sec. 3.213[4](rev. 3d ed. 1976)).

In *Bee Frank*, this Court also enunciated the legislature's dual intent in enacting Wis. Stat. §32.28(3)(d), "1) to discourage the condemnor from making inequitably low jurisdictional offers and 2) to make the condemnee, who meets the statutory requirements, whole." Internal citations omitted. *Id.* at 411.

More recently this Court in reviewing how property is to be valued in a partial taking condemnation agreed that,

..[J]ust compensation is to take into account the principle of Standard Theatres:.... 'statutory provisions in favor of the owner, such as those which regulate the compensation to be paid to him or her, are to be afforded liberal construction.' [internal citations omitted]" *Spiegelberg v. State of Wisconsin and Department of Transportation*, 2006 WI 75, ¶31, 291 Wis.2d 601, 717 N.W.2d 641. (Italics in original.)

In other words, the liberal construction in favor of property owners in condemnation proceedings is well grounded in the law of this State. Such construction requires the Klemms to be made "whole" by compensating them, not only for the value of the property taken, but also for the litigation expenses incurred when they obtained a condemnation commission award greater than \$700 and 15% of the highest written offer.

The Legislative History Of Wis. Stat. §32.28 Supports An Award Of Litigation Expenses

As discussed above, the Court may review a statute's legislative history as a check to a reading of the plain meaning of Wis. Stat. §32.28(3)(d) or when the statute is ambiguous.

The Legislative Council Staff Brief 77-7 (June 13, 1977) pointed to the then current law at pages 3-4,

Present Wisconsin Statutes do not permit recovery of any costs or expenses where the purchase price is negotiated or where the award of the condemnation commissioners is accepted by the condemnee....

....

A recent law review note put the argument succinctly:

'It is axiomatic that 'just compensation' less the costs of litigation no longer equals 'just compensation.' It follows that any landowner who is forced into court to obtain a fair award is penalized the amount of his expenses of litigation. Note, Attorney's Fees in Condemnation Proceedings, 20 *Hast. L. J.* 694, 696-97 (1969).'

Because of the court's reluctance to recognize 'just compensation' as the basis for a condemnee's constitutional right to attorney fees and other legal expenses, other legislative remedies have been sought. The theory of such approaches is that the condemnee holds an inherently inferior bargaining position in the condemnation process which the award of attorney fees will partially rectify....

The theory is that the condemning authority, knowing that the condemnee must incur litigation expenses to prove the true value of his property, will neither offer nor settle for full value. Since the condemning authority is already armed with one or more appraisals and ready access to staff litigation counsel at the outset of negotiations, it appears to be much less eager to avoid court action than the condemnee. The psychological disadvantage of the condemnee is compounded by his unfamiliarity with the process and the shock of having to plan for the sudden relocation of his home or business simultaneously with the price negotiations. Under such duress, many landowners settle out of court for less than full compensation, in the knowledge that the cost of obtaining a fair price may exceed the difference between such price and the condemnor's offer.

The intent of the attorney fees statutes is thus not to encourage litigation, but to equalize the bargaining position of condemnor and condemnee so that the former's offer and settlements will more nearly reflect full value.

R. 17, Ex. A., P-APP-52-53.

As a result of the Legislative Council Study and report, the legislature revised and adopted various fee shifting statutes, including Wis. Stat. §32.28, effective October 1, 1978. Subsequently, as cited previously, this Court ratified the precept that, "...the purpose behind the statute [Wis. Stat. §32.28] is to make the owner 'whole' through compensating the owner for the value of the property taken and for the attorney fees incurred in attempting to obtain this value." *Standard Theaters*, 118 Wis.2d at 744-745.

In comparison, the Court of Appeals at Footnote 7 commented:

We observe, however, that had the Klemms initially negotiated a price they were satisfied with, there would have been substantially less delay, no need for a jurisdictional offer, and no unnecessary litigation. While the Klemms' conveyance allowed prompt entry, a condemnor who proceeds with a jurisdictional offer need not wait until the conclusion of the proceedings to enter into possession. *See* Wis. Stat. §32.12.... 2010 WI App. at fn 7, P-APP-4.

This observation by the Court of Appeals overlooks the real benefit the condemnor obtains when it is able to enter upon the property the day after the recording of the conveyance. There is no need to institute proceedings to obtain court authorization to enter upon the property--no additional time incurred and no cost imposed upon the condemnor.

Under the Court of Appeals' analysis, an antagonistic property owner who refuses to cooperate at every step and succeeds in court is made whole with the award

of litigation expenses. In contrast, a cooperative property owner must absorb his litigation expenses. Surely, this is not what the legislature envisioned.

Further, the Court of Appeals fails to acknowledge the disparate bargaining powers of the parties. If the Klemms had been able to negotiate a better price prior to initiation of litigation, they certainly would have done so. A successful negotiation requires agreement of **both** the condemnor and condemnee. The fact that the Klemms were awarded 29% more compensation by the condemnation commission proves that the “highest offer” was not just compensation.

As cited above, the Legislative Council Study and report, citing a law review note determined, “...any landowner who is forced into court to obtain a fair award is penalized the amount of his expenses of litigation. Note, Attorney’s Fees in Condemnation Proceedings, 20 Hast. L. J. 694, 696-97 (1969).”

In view of the statutory language, legislative history and this Court’s directions on how Ch. 32 is to be construed, it is clear that the legislature did not intend to *penalize* a property owner who *cooperates* in the negotiations. The legislative history supports the granting of litigation expenses in this matter.

**Wis. Stat. §32.06(10)(b) Protects ATC From
Having To Pay More Than Just Compensation**

Wis. Stat. §32.06(10)(b) provides that if a verdict amount does not exceed commission award the condemnor has a judgment for the difference. This provision protects ATC and other condemnors from having to pay more than just compensation.

Dorschner v. Dept. Of Transportation, 183 Wis.2d 236, 515 N.W.2d 311 (Ct. App. 1994), involved a transportation condemnation under Wis. Stat. §32.05. Ironically, *Dorschner* involved an appeal from a negotiated settlement under Wis. Stat. §32.05(2a). 183 Wis.2d at 239. In *Dorschner*, the court found that, based on Wis. Stat. §32.05(11)(a), the State was entitled to recover the difference between the negotiated award and the jury award. To determine the amount of recovery owed to the State, the court interpreted the amount in the negotiated settlement as the “award” and subtracted the amount of the verdict. *Id.* at 242-243. In arriving at this conclusion, the court noted that, even though it was a case from a negotiated settlement under Wis. Stat. §32.05(2a),

This is a condemnation case, governed by the rights and procedures in ch. 32, STAT. The fact that the condemnation may be achieved via a purchase agreement under §32.05(2a) does not render the result of the provisions of ch. 32 inapplicable. *Id.* at 241.

In sum, Wis. Stat. §32.06(10) provides the statutory remedy to a condemning authority if it overcompensates a property owner. Moreover, as the court in *Dorschner* settled, the rights and procedures of all of ch. 32 apply to appeals from a negotiated purchase price. Those rights include the award of litigation expenses under Wis. Stat. §32.28(3)(d).

CONCLUSION

As the circuit court concluded, “Condemnees who choose to cooperate and opt for the appeal process of Wis. Stat. §32.06(2a) are in no less need of being made

whole than condemnees who hold out for a jurisdictional offer.” R. 18, p. 6, P-APP-88. The proper interpretation of Wis. Stat. §32.28(3)(d) should favor the construction which fulfills the purpose of Chapter 32.

The purpose of Wis. Stat. §32.28 borne out by the legislative history and case law is to discourage condemnors from making inequitably low offers and to make condemnees whole when they are forced to litigate the issue of just compensation. The Klemms did not want to hold up the project. The Klemms “agreed to” a price for compensation, with the express understanding that they retained their appeal rights. The Klemms should not be penalized for their cooperation.

Accordingly, the Klemms request this Court to reverse the decision of the Court of Appeals and reinstate the circuit court judgment.

Respectfully submitted this ____ day of February, 2011.

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CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief, including the statement of the case, the argument, and the conclusions and excluding other content, is 6,354 words.

The text of the electronic copy of this brief is identical to the text of the paper copy.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of February, 2011.

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**CERTIFICATE OF COMPLIANCE
WITH RULE WIS. STAT. §809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this ____ day of February, 2011.

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